

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-081048
	:	TRIAL NO. C-08CRB-14987
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
JOSEPH BARTEE,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a jury trial, defendant-appellant Joseph Bartee was found guilty of child endangering. The trial court imposed six months' imprisonment, but gave Bartee credit for time served and suspended the remainder of the sentence. Bartee was placed on three years of community control.

At trial, the state established that, on May 4, 2008, Bartee's neighbor, Dan Blevins, had called the police after hearing banging coming from Bartee's apartment. In addition to the loud noises, Blevins had heard someone shout "I'll kill you." Hamilton County Sheriff's Corporal Mike Carney responded to Blevins' call. Corporal Carney heard yelling from Bartee's apartment and noted a symbol drawn in blood on the apartment door. The apartment door swung open as Corporal Carney attempted to knock, and Carney was greeted by a disheveled Bartee at the door. Corporal Carney

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

testified that Bartee was bleeding from his head, was dressed solely in underwear, and was wielding a samurai sword.

Upon entering the apartment, Corporal Carney restrained Bartee and, after obtaining consent, conducted a search of the area. Carney found several firearms inside the apartment. Carney's testimony established that the apartment contained a fully loaded .45-caliber weapon on the bathroom vanity, a loaded 9-mm weapon on the kitchen counter, a 7.62-mm handgun on a table, and a sawed-off shotgun on a mattress in the living room. In addition to these weapons, Carney viewed several knives and numerous punctures in the wall from the samurai sword. Carney did not administer any formal tests, but testified that, in his opinion, Bartee was under the influence of alcohol.

According to Carney, Bartee believed that his apartment building was infested with drug dealers who had been harassing him because he was a former police officer. Before he was taken to the sheriff's station, Bartee revealed to Corporal Carney that his four-year-old son was sleeping in the apartment's bedroom. Carney found the son asleep and made arrangements for the child's care before arresting Bartee.

Bartee testified on his own behalf at trial. According to Bartee, sometime between 1:00 a.m. and 3:00 a.m. he had asked a group of people outside to quiet down, as he did not want to have his son awakened by their noise. The group responded by verbally cursing him and tapping at his window.

Bartee further testified that he bought firearms and attempted to sell them for a profit, and that he had been cleaning his firearms during the night while his son slept. Bartee explained that he had the samurai sword because he practiced martial arts. He denied stabbing the sword into the wall that evening. Bartee further stated that he had instructed his son never to touch a firearm.

In his first assignment of error, Bartee now argues that his conviction was not supported by sufficient evidence.

Bartee was convicted of child endangering under R.C. 2919.22(A). The statute provided that “[n]o person, who is the parent * * * of a child under eighteen years of age * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support.” Substantial risk is defined as “a strong possibility, as contrasted with a remote or significant possibility.”²

In this case, the record supports Bartee’s conviction for child endangering. While his child slept, Bartee had wielded a samurai sword and had punctured apartment walls with it; he had placed four firearms in open view in his apartment, two of which were loaded; the apartment contained numerous knives; Bartee had been bleeding from his head and had drawn a symbol on his apartment door in blood; and Bartee’s neighbor had heard him yell “I’ll kill you.”

We stress that the mere presence of a loaded weapon would not have been enough to support a conviction for child endangering. But in this case, the loaded weapons were one contributing factor, along with many others that we have noted. The totality of the circumstances clearly indicated that Bartee’s behavior posed a significant risk to the safety of his child. Had Bartee’s son awoken, he could have easily gained access to the weapons. And Bartee’s behavior significantly drew into question his ability to properly protect his son. We conclude that the conviction for child endangering was supported by sufficient evidence³ and overrule the first assignment of error.

² R.C. 2901.01(A)(8).

³ *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

In his second assignment of error, Bartee asserts that he received ineffective assistance from his trial counsel. To succeed on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance.⁴ It must be shown that, but for counsel's deficient performance, the result of the proceedings would have been different.⁵

Bartee first alleges that his counsel was deficient for failing to object to irrelevant and prejudicial testimony at trial, specifically Officer Carney's testimony concerning the unloaded firearms found in Bartee's apartment. We disagree. First, in addition to these unloaded weapons, the apartment contained two loaded firearms and numerous knives. Carney's was not the only testimony concerning weapons, and we cannot say that, but for the testimony regarding the unloaded weapons, Bartee would have been acquitted. We further reject Bartee's characterization of these weapons as irrelevant. To the contrary, they contributed to the totality of the circumstances supporting Bartee's conviction. Although they were unloaded, the weapons still posed a danger to Bartee's young child. Bartee's counsel was not ineffective for failing to object to this testimony.

Bartee next asserts that his counsel was ineffective for failing to file a motion to suppress the evidence found inside his apartment. We disagree. As the Ohio Supreme Court has noted, "we have rejected claims of ineffective counsel when counsel failed to file or withdrew a suppression motion when doing so was a tactical decision, there was no reasonable probability of success, or there was no prejudice to the defendant."⁶

⁴ *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.

⁵ *Id.* at 694.

⁶ *State v. Nields*, 93 Ohio St.3d 6, 34, 2001-Ohio-1291, 752 N.E.2d 859.

In this case, the record does not demonstrate that Bartee had a reasonable probability of succeeding on a suppression motion. Because Bartee had been overheard yelling “I’ll kill you,” it appears that exigent circumstances justified the entry into and search of his apartment.⁷ Further, counsel’s failure to file a suppression motion was a tactical decision. Rather than seeking to suppress the evidence, counsel sought to demonstrate that the evidence found in the search posed no danger to Bartee’s child. We cannot conclude that Bartee’s counsel was ineffective, and we overrule the second assignment of error.

Therefore, the judgment of the trial court is affirmed.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 30, 2009
per order of the Court _____
Presiding Judge

⁷ See *State v. Martin*, 1st Dist. No. C-040150, 2004-Ohio-6433, ¶20.